IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4902 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THE BRANCH MANAGER, COMMERCIALCLEARING AGENCIES PVT.LTD.,

Versus

MANIBHAI D BHOJANI

Appearance:

1. Special Civil Application No. 4902 of 1994

MR SHAILESH C PARIKH for Petitioner No. 1

MR DJ BHATT for Respondent No. 1

MRS SANGEETA N PAHWA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 17/01/2004

ORAL JUDGEMENT

#. Heard learned advocate Mr.Shailesh C. Parikh on behalf of the petitioner and learned advocate

Mrs.Sangeeta Pahwa for respondent workman.

#. In the present petition, the petitioner has challenged the award passed by the Industrial Tribunal, Ahmedabad in Reference [ITC] No. 3 of 1989 dated 29th April, 1993, wherein the Industrial Tribunal, Ahmedabad has set aside the order of termination which was passed in contravention of provisions of Section 25-F of the I.D.Act, 1947 and consequently, it was held that the workman continues in continue service with effect from 1.3.1988. Along with the petition, on behalf of the petitioner, certain documents have been produced on record. Annexure-A is the letter of appointment of the respondent workman dated 31st October, 1986 issued under signature of Director Mr.Siddahartha Sen, Annexure-B is the letter dated 15th February, 1988 is termination order issued under signature of Mr.D.S.Paadnis, Director of the company, Anneuxre-C is the letter extending probation period dated 18thMarch, 1987, page.15 which is not given any annexure is the letter under signature of Mr.Prakash J. Mahatre, Assistant Manager against the petitioner. Similarly, there is another letter dated 26th May, 1987 issued under signature of Mr.P.J.Matre, page.17 is a letter dated 2.9.87 under signature of Mr.D.S.Phadnis, Director extending the probation period, page.18 is the letter of Director Mr.Siddhartha Sen addressed to the Asstt. Collector of Customs in the subject of issue of customs passed in favour of Shri Manibhai Bhojani, page.19 is the letter dated 16.11.87 is in respect of complaint of Mr.Harish Thakkar against Mr.Bhojani, page.20 is the copy of the letter dated 5th October, 1987 under signature of Mr.P.J.Matre, page.21-22 is the explanation given by the workman, page.23-24 is the letter under signature of Mr.D.S.Phandnis, Director, page.25 is the inter office memo and copy thereof given to Mr.Bhojani, page.26 is the copy of the Memorandum dated 24.12.1987, page.27 is the letter written by Mr.Bhojani to the Managing Director dated 30.1.1987, page.28 - 29 are the letter of Mr.P.J.Mhatre in respect of Memorandum dated 24.12.87 and 1st January, 1988, page.30 is letter dated 15th February, 1988 written by Mr.Phadnis to Mr.Mhatre. Except that, no other document has been produced on record.

#. Certain undisputed facts are narrated by the Industrial Tribunal in para-6 and 7 of the award. According to the undisputed facts as narrated by the Tribunal, the concerned workman was taken in service in 1986. Exh.40 is the letter given to the concerned workman. It shows that that he was taken up in service as Customs and Dock Clerk w.e.f. 1.11.1986. However,

reference must be made by to another letter at Exh.48. It is dated 10th Septe.1986. It was addressed by the Director of the first party to the Asstt. Collector of Customs, Bombay. It was mentioned therein that Shri Manibhai Bhojani was their full time employee and payment was made to him. It is a letter of 10th September, 1986. It must be held that on 10th September, 1986 he was in service and so subsequent letter at Exh.40 would show that he was taken up in service with effect from 1.11.86 is not correct, There are, therefore, reasons to believe that he was in service at least in the month of September, 1986. Section 25-F has been violated by the company and it is not case of the company that Section 25F has been complied with. Service of the workman terminated with effect from 29th February, 1988 by order dated 15th February, 1988. Duration of service from September, 1986 to 29th February, 1988, meanwhile, the workman remained in continue service with the company, for that there is no dispute raised by the petitioner company.

#. In light of above referred to undisputed facts, learned advocate Mr.Shailesh Parikh raised certain contentions challenging the award. The first contention is that this being private management and therefore, the appropriate Government is State Government and not Central Government. The second contention is that branch in which the workman was working, has been closed on 1st August, 1988 and termination did not amount to retrenchment as it covered by exception of 2[oo][bb] of the I.D.Act, 1947. He also submitted that once the establishment is closed, then, the industrial tribunal should not have granted the order of reinstatement against the closed establishment. He also submitted after termination, he was engaged and employed gainfully in one Radhakrishna Shipping Company at Kandla. He also submitted that his service has been terminated by the company during the probation period at the end of last day as per the order passed by the company due to unsatisfactory work. Therefore, it amounts to retrenchment. He also submitted that in case of closure of the establishment, the tribunal should not have passed the order of reinstatement but if at all, if the order of termination is found to be bad, in that case, the tribunal ought to have granted order awarding some compensation to the workman till the date of closure. In support of his submission, learned advocate Mr.Parikh has relied upon one decision rendered by the Andhra Pradesh High Court reported in 1983 Lab.I.C. NOC 91 [Andh.Pra.] wherein the view taken that company having right to close down some of its establishment and workmen have no right

to re-employment in other depot which are functioning. Such view is taken by the Andhra Pradesh High Court in case of A.P.Federation of I.L.T.D. Co. Workers, Guntur and others v. Government of A.P. and others. He also emphasised that the Andhra Pradesh High Court has relied upon the decision of Supreme Court reported in 1970 Lab.I.C 755 [SC] in case of WORKMEN OF THE INDIAN LEAF TOBACCO DEVELOPMENT CO. LTD, GUNTUR V. THE MANAGEMENT OF INDIA LEAF TOBACCO DEVELOPMENT CO. LTD, GUNTUR, wherein the view taken by the Apex Court that Even if such closure may not amount to closure of business of the Company, the Tribunal has no power to issue orders directing a Company to reopen a closed depot or branch. Of course, if a Company closes down a branch or a depot the question can always arise as to the relief to which the workmen of that branch or depot are entitled and, if such a question arises and becomes the subject matter of an industrial dispute, an industrial Tribunal is full competent to adjudicate on it, and it is competent for the Tribunal to decide whether the claim of the workmen that they should not be retrenched is justified. In such circumstances, the workmen are entitled to retrenchment compensation only and cannot claim any re-employment or reinstatement. The third decision relied upon by the learned advocate Mr.Shailesh Parikh is in the case of Shaw Wallance & Company Ltd. v. N.R. Trivedi C/O Jayantilal R. Shah reported in 1999 [1] GLR 794, wherein this Court has taken a view that if the conclusion of the labour court is perverse and the reasoning or perverse approach to the matter, in that case, this Court can certainly interfere with such findings by exercising the powers under Article 226 and 227 of the Constitution of India. Learned advocate Mr.Shailesh Parikh has also submitted that this decision also deals with on the issue of closure and discussion to that effect is in para-12 of the said decision. This Court has observed that if the petitioner happens to restart its business in Gujarat, then the petitioner will have to give preference to the said retrenched employees. Therefore, relying on such observations of the decisions referred to above, learned advocate Mr.Parikh contended that grant of relief of reinstatement against closed establishment, is held to be bad by this Court. Except the above referred submissions and decisions mentioned above, no other submission made nor any other decision of any Court cited before this Court.

#. Learned advocate Mrs.Sageeta Pahwa appearing on behalf of the respondent workman has submitted that the industrial tribunal has rightly passed the award granting relief in favour of the workman and the industrial

tribunal has not committed any error which requires any interference by this Court while exercising the powers under Article 227 of the Constitution of India. She submitted that the contentions as to appropriate Government and Section 2[oo][bb] were not raised by the employer before the Industrial Tribunal and therefore, this Court cannot taken into consideration such question as the said contentions are raised for the first time before this Court. She also submitted that a branch which has been closed down with effect from 1.8.1988 as referred to in award, but the Industrial Tribunal has rightly observed that whether closure is legal or not, is not the question, referred to for adjudication to the Industrial Tribunal. She also emphasised that the Industrial Tribunal has not granted any relief of reinstatement but it merely passed the declaratory order on finding that termination is bad, illegal and violative of statutory provisions of the Act and therefore, the workman is deemed to be continue in continues service. She also submitted that if management is aggrieved because of closure, then, they should have further passed fresh order of termination after receiving the award from the industrial tribunal. But no further steps have been taken by the employer and they set tight as it is and challenged the award in question. Therefore, according to her submission, that services of the respondent workman terminated because of non suitability and unsatisfactory working, none of the material produced and even contents of that material has not been proved by the petitioner before the Industrial Tribunal. Therefore, unless the material relating to unsatisfactory work is proved before the Industrial Tribunal, certainly, that material cannot be looked into by the Industrial Tribunal. That is how, rightly observed by the Industrial Tribunal that such material was not proved before the Industrial Tribunal by the petitioner. She also submitted that no doubt that it is power of the employer to terminate service of the probationer on the ground of nonsuitability and unsatisfactory work, then also, it is incumbent upon the employer to satisfy the industrial tribunal as to dissatisfactory work and unsuitability of the workman by producing necessary and relevant materials before the Industrial Tribunal. She also emphasised that looking to the observations made by the Industrial Tribunal and the document page.34 internal page.4 that none of the documents have been produced and even the contents have not been proved by the petitioner and therefore, such material cannot be taken into consideration by this Court especially when the same was not proved before the Tribunal. She also submitted that even retrenchment has been rightly considered by the

Industrial Tribunal that termination of the probationer is also covered by definition of retrenchment and Section 25-F is required to be followed which is undisputedly not followed by the petitioner and that is why, termination order held to be invalid and illegal. Therefore, her submissions is that from all angles, the tribunal has rightly decided and adjudicated the issue and the dispute referred to the tribunal for adjudication, for that, there is no basic error committed by the tribunal while passing the award and as such, no interference is warranted at the ends of this Court while exercising the jurisdiction under Article 227 of the Constitution of India.

#. I have considered submissions made by the learned advocates appearing on behalf of the respective parties. The facts are not much in dispute. Appointment of the respondent workman was also not disputed and probation period had come to an end on 29th February, 1988 is also not disputed. Considering the termination order which is produced on page 13 of the petition, the language used suggests that the employer while terminating service of the workman recorded that "inspite of giving you several opportunities, there is no improvement in your performance and / or behaviour and therefore, your services are being terminated with immediate effect". Except that in termination order, about unsuitability and unsatisfactory work of the workman is not disclosed. Now let us see the first contention raised by the learned advocate Mr.Parikh as to appropriate Government, is not the Central Government who had referred the matter for adjudication but it was State Government. It may be appreciated that this contention was not raised by the petitioner before the industrial tribunal and even it was not case of the petitioner and it is for the first time such contention has been raised before this Court. Therefore, the plea which has not been raised before the Industrial Tribunal and first time if it is raised before the High Court, then High Court should not allow to raise such contention to the petitioner. Similarly, the contention of Section 2[oo][bb] was also not raised by the petitioner before the industrial tribunal and it has been first time raised before this Court and similarly such contention also cannot be allowed to be raised by this Court to the petitioner. Such view has been taken by the Hon'ble Apex Court in case of KRISHI UTPADAN MANDLI SAMITI THROUGH ITS SECRETARY, ANAND NAGAR AND ARVIND CHAUBE AND ANOTHER reported in 2003-I-LLJ pg.507. In the said matter, the plea that the employer is not an industry was not taken before the tribunal. It was held by the apex court that it could not be canvassed higher

up. In para 2 of the said judgment it has been observed by the apex court as under:

"2. Learned senior counsel for the appellant contended that the appellant Mandli Samiti is not an 'industry' governed by the provisions of the UP Industrial Disputes Act, 1947. The High Court has held against the appellant on the ground that such a contention was not canvassed before the Industrial Tribunal and also following an earlier decision of another Bench, the High Court dismissed the writ petition. Once the appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up."

Therefore, these two contentions of the petitioner are not permissible under the law as per the view taken by the Apex Court and therefore, same are not entertained by this Court at this occasion and it is not allowed to be raised to the petitioner before this Court and same are rejected accordingly.

#. In respect of non suitability and unsatisfactory work of the respondent workman, various documents are produced before this Court, which show that most of the letters written by Mr.P.J.Matre and some by Mr.Siddarth Sen who was the Director. Before the Industrial Tribunal, one witness viz. Deepakkumar Kadam was examined by the petitioner. By his evidence, such correspondent of Mr.Matre and Mr.Siddharth Sen cannot be proved. Even contents of such documents were also not proved as per the evidence of Mr.Kadam discussed by the Industrial Tribunal that he is not aware of such correspondent but at that time he was not there and he got no knowledge about what had happened at Gandhidham and therefore, evidence of Mr.Kadam was not helpful to the petitioner for proving the said material against the respondent workman. Therefore the Industrial Tribunal has rightly observed as under :

"Shri Deepkabhai Kadam, Exh.59 has said that it is written by Prakash Jayram. It does not appear to have been written by Prakash Jayram. Shri Deepakkumar has said that he had joined the service of the first party from August, 1987. His posting was made at Bombay. He had never gone to any place except Bombay and so he was got no knowledge about what has happened in Gandhidham. He was not in service in the year

1986 when Shri Bhojani was appointed. He does not know whether the concerned workman was replied Exh.50. He does not know what work was entrusted to Shri Bhojani. Thus he was examined to prove some letters. However, he was never in Gandhidham and so he had never seen Shri Mahtra writing any letter. Still however, he has said that Shri Mahtrae had written some letters and they were exhibited. Proof of the execution of letters will not amount to proof of the contentions of the documents. At the same time proof of contents of the documents will not amount truth of the contents of the documents. Therefore, production of documents by this witness as being written by Shri Mahtre will not amount to anything."

#. In view of above observations made by the Industrial Tribunal, the material is not proved before the Industrial Tribunal by the petitioner for unsuitability and unsatisfactory work of the respondent workman. This aspect has been recently examined by the Apex Court in case of PARMANAND V. NAGAR PALIKA, DEHRADUN AND OTHERS reported in 2003 SCC [Lab. & Ser.] 1236. Facts before the Apex Court similar to the facts of the present case. The relevant para-6 of the said decision is referred to as under :-

"6. So far as the question raised that the appellant's service have been terminated on the basis that he was a probationer does not merit serious consideration for Rule 9 of the Service Rules of the Nagar Palika has not been complied with before putting an end to his service. We may also as a matter of fact note that no material was made available before the labour court to show that the work of the appellant was not satisfactory during the period of probation. On the other hand the sole witness examined on behalf of the Nagar Palika admitted that he is not aware of the fact that the service of the appellant was in any way unsatisfactory. The order putting an end to the services of the appellant is also not made available to us to find out as to on what basis his services have been put to an end. In the absence of any material, we are surprised, as to how the High Court could have reached such a conclusion. On the aspect regarding the siblings being not allowed to work in the same Municipality, no rule is made available but on the other hand the

appellant produced material to show that there were several employees on the rolls of the municipalities who are related to one another either as brothers or father and son or in some other manner. In the circumstances, we find that none of the reasons given by the Municipality have any basis therefore the Labour Court was perfectly justified in setting aside the order of termination and directing his reinstatement with full backwages. We have no hesitation to set aside the order of the High Court and restore that of the Labour Court. The appeal is allowed with costs quantified at Rs.10,000."

#. Considering the observations referred to above, looking to the facts of this case though certain material was produced, but not proved, that means, it amounts to absence of the material. Therefore, the aspect of unsuitability and unsatisfactory work or performance and behaviour as alleged by the petitioner against the respondent workman not proved or justified by proper legal evidence by the petitioner. This aspect has been rightly considered by the Industrial Tribunal and for that, the tribunal has not committed any error.

##. In respect of the contention raised by the learned advocate Mr.Parikh that service of the probationer is terminated then, it does not amount to retrenchment and this aspect has been examined by the Apex Court in case of SYED AZAM HUSSAINI V. ANDHRA BANK LTD. reported AIR 1995 SC 1352. The relevant observations made by the Apex Court in aforesaid case in para-12 and 13 are quoted as under :

"12. In the present case we find that Section 40 of the Act entitles a workman to assail the legality of the termination of his services if it is made without any reason able cause. The order dated January 2, 1971 did not contain any reason for termination of the services of the appellant. Before the Authority the appellant assailed the legality of the termination of his services on the ground that the said termination was without any reasonable cause and that it was done with a view to victimise him for having joined the union. The case of the respondent-bank before the Authority was that the services of the appellant were terminated for the reason that he was on probation and his work was not satisfactory. This was disputed by the appellant

who asserted that during the period of his service no body pointed out any defect in his work and that he did not receive any memo and further that he was ready and willing to do whatever work that was allotted to him and worked to the best of his abilities. The Authority has observed that these averments made by the appellant were not denied by the respondent-bank. Moreover, the respondent bank did not produce any material to show that the performance of the appellant was not satisfactory. In the absence of any material having been placed by the respondent-bank to show that the work of the appellant was not satisfactory and that his services were terminated for that reason, the Authority as well as the Labour Court were justified in recording a finding that there was no reasonable cause for terminating the services of the appellant. The said finding has not been upset by the High Court. The learned Judge of the Division Bench of the High Court were, therefore, not right in upholding the legality of the termination of the services of the appellant.

13. There is one more hurdle in the path of the respondent bank. It cannot be disputed that the appellant had completed 240 days of service since he had joined duty on April 6, 1970 and his services were terminated on January 2, 1971. The appellant was a "workman" for the purpose of Section 2(s) of the Industrial Disputes Act, 1947 since he was employed in the clerical grade with the respondent-bank which is an "industry" under Section 2(j) of the Industrial Disputes Act, 1947. The termination of appellants services was, therefore, retrenchment under Section 2(oo) of the Industrial Disputes Act, 1947 and it could be done only in accordance with the provisions contained in Section 25-F of the Industrial Disputes Act, 1947. In Krishna District Cooperative Marketing Society Ltd. Vijayawada v. N. V. Pumachandra Rao & Ors., 1987 (4) SCC 99, this Court has construed the provisions of Chapter V-A of the Industrial Disputes Act, 1947 and Sections 40 and 41 of the Act and has held that if the employees are 'workmen' and the management is an 'industry' as defined in the Industrial Disputes Act and the action taken by the management amounts to 'retrenchment' then the rights and liabilities of the parties are governed by the provisions of Chapter VA of the

> Industrial Disputes Act and the said rights and liabilities may be adjudicated upon and enforced in proceedings before the authorities under sub-sections (1) and (3) of Section 41 of the Act. In that case proceedings had been initiated in the form of appeal filed under Section 41 of the Act before the Authority and it was held that since the orders for termination of services of the employee amounted to retrenchment and had been passed without complying with Section 25-F of the Industrial Disputes Act, the order of the Authority setting aside the said orders of termination could be affirmed in view of Section 25-F of the Industrial Disputes Act. This Court further held that it is open to the authority under Section 41 of the Act to determine whether Section 25-F and Section 25-G of the Industrial Disputes Act were complied with or not and to set aside the orders of termination and to grant appropriate relief if it is bound that there was non-compliance with Sections 25-F and 25-G of the Industrial Disputes Act. Applying the said decision to the facts of the present case it can be said that since the appellant was a workman and the respondent-bank is an industry under the Industrial Disputes Act the action taken by the respondent-bank in terminating the services of the appellant amounts to 'retrenchment' and since the appellant had worked continuously for more than 240 days such retrenchment could be done only in accordance with provisions of Section 25-F of the Industrial Disputes Act, 1947. The said provisions were admittedly not complied with because one month's wages in lieu of notice were not paid at the time of such retrenchment on January 2, 1971 and were paid subsequently on January 5, 1971. The termination of the services of the appellant cannot, therefore, be upheld as legal and valid."

Therefore, contention raised by the learned advocate Mr.Parikh is not accepted relying upon aforesaid decision of the Apex Court that termination of probationer is also amount to retrenchment and that retrenchment procedure has not been followed by the petitioner at the time when the services of the workman terminated.

##. The last contention raised by the learned advocate Mr.Parikh that establishment has been closed down with effect from 1.1.1988, then the industrial tribunal should

not have passed the order of reinstatement. The industrial tribunal has considered this fact that Office at Gandhidham was closed, from which, the service of the workman came to be terminated by the petitioner. However, it may be appreciated that the tribunal has rightly observed that this question was not called upon to be decided by the appropriate Government and question of closure of the establishment of the first party, means, the petitioner's office at Gandhidham and therefore, the tribunal has no jurisdiction to decide such dispute about the closure of the office at Gandhidham. The fact could not be ignored that the tribunal was called upon to decide only the industrial dispute that whether termination of the concerned workman Mr.Bhojani from service with effect from 1st March, 1988 is justified or not ? It was the only limited aspect to be adjudicated by the tribunal and that is rightly decided by the tribunal. It is also very clear from the operating portion of the award passed by the Tribunal wherein, the tribunal has not granted any relief of reinstatement but the tribunal has only set aside the termination which was not found to be justified by the employer and consequently, it has been held that the respondent workman deemed to be continue in continuous service with effect from 1st March, 1988. In such circumstances, after receiving the award, it was the duty of the employer to take some steps or the petitioner could have passed appropriate orders in accordance with the closure procedure. But it is very material to consider that termination is not based upon closure but it was case of unsuitability and unsatisfactory work of the respondent workman. When termination is not based upon the closure, then this question cannot be examined by the tribunal and the tribunal has remained within its jurisdiction and only declaratory relief has been rightly granted by the tribunal. When Section 25-F has been violated being the mandatory provisions and condition precedent has not been followed, then the order of termination become ab initio void and the workman is deemed to be in service. This being the legal aspect, has been examined by the Apex Court in case of MOHAN LAL V. THE MANAGEMENT OF M/S BHARAT ELECTRONICS LTD. reported in AIR 1981 SC 1253. The relevant observations made by the Apex Court in para-9 that a moment, termination is found to be violative of Section 25-F, then the order of termination is ab initio void and in other words, it does not bring about cessation of service of the workman and the workman continuous to be in service. The relevant observations made by the Apex Court in aforesaid decision in para-9 are referred to as under :-

"9. Reverting to the facts of this case, termination of service of the appellant does not fall within any of the excepted, or to be precise, excluded categories. Undoubtedly therefore the termination would constitute retrenchment and by a catena of decisions it is well settled that where prerequisite for valid retrenchment as laid down in section 25F has not been complied with, retrenchment bringing about termination of service is ab initio void. In State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors., this Court held that failure to comply with the requirement of section 25F which prescribes a condition precedent for a valid retrenchment renders the order of retrenchment invalid and inoperative. In other words, it does not bring about a cessation of service of the workman and the workman continues to be in service. This was not even seriously controverted before us."

##. The scope of Section 2[oo] of the Industrial Disputes Act, 1947 has been examined by the Apex Court in case of PUNJAB LAND DEVELOPMENT & RECLAMATION CORPORATION LTD. V. THE PRESIDING OFFICER, LABOUR COURT, reported in JT 1990 [2] S.C. 489, wherein the question has been examined by the Five Judges Bench of the Apex Court and after taking into consideration all the relevant decisions on the issue, in detail, considered the meaning of retrenchment under Section 2[oo] of the I.D.Act. The relevant observations made in para-82 are reproduced as under :

82. Applying the above reasonings; principles and precedents, to the definition in s. 2(00) of the Act, we hold that "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section."

Thus, the Apex Court has clearly held that any kind of termination of the workman and held that Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the Section of the I.D.Act.

##. Therefore, the tribunal has rightly granted the relief for which the workman is legally entitled and therefore, the tribunal has rightly adjudicated the industrial dispute which has been referred for

adjudication as per the jurisdiction conferred on the tribunal and not committed any error as regards its jurisdiction. There is no bar with the employer in case after receiving the award to pass appropriate order of termination on the ground that the establishment has been closed down. But as such, no steps have been taken so far by the petitioner being the employer and therefore, they have to face the situation. Moreover, one fact which is relevant to note that the workman was not appointed only for Gandhidham office as being indicated from the appointment order which is at page.12. On the contrary, it is found that he was appointed and posted at Gandhidham and he was an employee of the company and therefore, Service Rules are binding to the company as well as to the workman and therefore, looking to the technical contention raised by the learned advocate Mr.Parikh that since the Branch based at Gandhidham has been closed down, the workman is not entitled to reinstatement with the company, is incorrect looking to the appointment order which is placed on record at page.12 - Annexure-A to the petition. It also requires to mention that the workman was not appointed only at Gandhidham Branch of the Company. In fact, the reality is otherwise and the workman was appointed by the company without any specific place but in specific post.

##. Looking to the entire facts and controversy in respect of legal aspect as well as factual, are in very narrow compass. The respondent was appointed by order dated 31st October, 1986 in the post of Custom and Dock Clerk with effect from 1st November, 1986. The appointment order is produced on record of this petition which is at Page.11 being Annexure-A. In the said order, nowhere, it is stated that the respondent has been appointed only for the office based at Gandhidham. Even there is no mention about Gandhidham Office. On the contrary, job responsibility would be covering the entire operation related to the post in question, in which, the respondent was appointed. Initially, a probation period of six months was prescribed, which was extended upto 29th February, 1988 and by order dated 15th February, 1988 which is at page.13 Annexure-B service of the respondent has been terminated. In the said termination order, the grievance mentioned by the petitioner that inspite of giving sufficient opportunities, there is no improvement in performance and behaviour of the workman and therefore, it resulted into termination. It is relevant to note that the contention raised by the petitioner that Section-25-F is not applicable as the respondent was appointed on probation by particular duration and his service came to an end by afflux of

time. Therefore, this being contractual appointment and covered by Exception Section 2[oo][bb] of the Industrial Disputes Act, 1947. Admittedly, the petitioner has not raised the said contention before the Industrial Tribunal. Therefore, this Court has not accepted the contention and rejected the same. Apart from the fact, the termination is either simple or stigmatic. If the case of the petitioner is that it is not simple termination, then, it must have to be considered a stigmatic termination. Section 2[oo] covered any kind of termination as retrenchment. Section 2[oo][bb] provides that termination of the services of the workman as a result of non renewal of the contract of the employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein. This provision is relating to a contractual appointment which has some connection with specific work or project but it will not apply to the regular appointment of the employee. In appointment order, no such purpose has been mentioned that for specific purpose, contractual appointment has been prescribed by the petitioner. In fact, the respondent was appointed regularly after following due procedure of recruitment and appointment has been given to the respondent, in other words, after interview, respondent was selected and appointment order was given. So, merely appointment on probation after a process of regular appointment, cannot be considered to be a contract of an employment because period is specified in the appointment order. Therefore, though this contention has been rejected by this Court, but, according to my opinion, if an employee has been regularly appointed by specifying particular period without any specific purpose or reason or appointment on project, normally, Clause [bb] of Section 2[oo] will not come in any way. Therefore, the respondent was appointed regularly on probation and Section 2[oo][bb] is also not applicable to the facts of this case. Looking to the records produced on record of this petition, various allegations made against the respondent as transpires from the correspondence between the Director and higher officer as well as with the respondent. The said allegations are misconduct according to the Service Rules of the company. Even explanation was called for which was tendered by the respondent but remained without any final order and therefore, mere bare perusal of the record suggests that the order of termination is stigmatic. It is not such simple that merely the work of the probationer has been observed by the employer whether it is satisfactory work or not but there was something more which has been taken into account by the employer

while terminating service of the workman. Therefore, if order of termination is simple in nature, then, it amounts to retrenchment and if it is stigmatic, then principles of natural justice require to be followed. Undisputedly either of the procedure not followed by the petitioner. Therefoer, the order of termination is bad and illegal. If an employer has considered the allegations and alleged misconduct as foundation, then, reasonable opportunity is a pre condition before passing the termination order, that has not been observed by the petitioner. Looking to the record produced by the petitioner with the petition, it has direct nexus with the termination order. Therefore, such conclusion of terminating service of the employee amounts to dismissal. This aspect has been considered by the Apex Court in case of NAR SINGH PAL V. UNION OF INDIA AND OTHERS reported in 2000 AIR SCW 1141. The relevant observations made in para-8 & 9 are relevant and therefoer, same are referred to as under :

"8. The documents which have been placed before us pertain to the preliminary enquiry made against the appellant in which the statement of certain persons who had seen the incident was recorded. The services of the appellant were, thereafter, terminated by paying him the retrenchment compensation through a cheque along with the order dated 20.5.1992. The order having been passed on the basis of preliminary enquiry and not on the basis of regular departmental enquiry without issuing a chargesheet or giving an opportunity of hearing to the appellant, cannot be sustained.

9. We may, at this stage, refer to the observations of Krishna Iyer, J. in Gujarat Steel Tubes Ltd. V. Gujarat Steel Tubes Mazdoor Sabha, [1980] 2 SCC 593 : [AIR 1980 SC 1896 : 1980 Lab IC 1004] in which the learned Judge observed as under :

"53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus

> scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."

##. In the aforesaid observations, the Apex Court considered the decision of Gujarat Steel Tubes Ltd. V. Gujarat Steel Tubes Mazdoor Sabha, [1980] 2 SCC 593. The important observation is that the Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. If an alleged misconduct and a live nexus between it and the termination of service conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used. Looking to the facts of this case, the documents connected with the termination order are, prima facie, satisfied to this Court that said termination is a punitive and not simple as alleged by the petitioner. Therefore, on both these counts, if according to the case of the petitioner, this being simple termination, then also, it amounts to retrenchment and when Section 25-F has not been followed and even if it is stigmatic, reasonable opportunity has not been given and therefore also, termination is bad. The contention of the petitioner that Gandhidham office is closed, then the

Court should not have passed the order of reinstatement. In appointment order, it is not specifically mentioned that the respondent has been appointed only in Gandhidham office. It is an appointment order issued by the company and according to the service rules, service of the respondent is transferable. Therefore, merely Gandhidham office is closed, it will not adversely affect the legal right of the respondent to get reinstatement when the order becomes ab initio void. The petitioner has appointed respondent in the post and not in the place and therefore, that is material and place of working is immaterial because he was not posted only at Gandhidham. Therefoer, according to my opinion, the Tribunal has rightly passed the award in question granting relief for which the respondent is legally entitled.

##. In light of my aforesaid discussions, in my humble opinion, there is no dispute with the ratio and the law laid down by the Apex Court in the the decisions relied upon by the learned advocate Mr.Shailesh Parikh but looking to the facts and circumstances of the case on hands, the decisions are not of any assistance to the case of the petitioner inasmuch as no relief of reinstatement has been granted by the industrial tribunal, nor it is the award passed by the tribunal directing re-employment against the closure establishment. Furthermore, the workman was not appointed by the petitioner company only for place at Gandhidham but he was appointed by the petitioner company and therefore, these decision relied upon by the learned advocate Mr.Parikh, are not helpful to case of the petitioner in support of his contentions and therefore, they are not relied upon for disposal of this case by this Court.

##. In the present petition, the award has been challenged by the petitioner under Article 227 of the Constitution of India. This Court having very limited jurisdiction to examine the legality and validity of the award in question. Recently, the view taken by the Apex Court in respect of the judicial powers of this Court in case of SYED T.A. NAQSHBANDI AND OTHERS V. STATE OF JAMMU & KASHMIR AND OTHERS reported in [2003] 9 SCC 592. The following observations made in Head Note [H], since relevant to be observed, referred as under :

"Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or

> independent analysis or appraisal of the material by the Courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly established facts and further proved to be well justified in law, for being countenanced by the court in exercise of its powers of judicial review. Unless the exercise of power is shown to violate any other provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before Courts."

##. In view of above observations made by the Apex Court that on the aspect of judicial review, according to my opinion, the tribunal has rightly dealt with the aspect on the basis of the material placed before the tribunal. The tribunal has rightly considered the legal evidence of the respective parties and rightly appreciated the facts and very well adjudicated the disputes having been within the framework of its jurisdiction and passed just and proper award. The tribunal has not committed any error while passing such award. There is no procedural irregularity committed by the tribunal while passing such award. There is no violation of any statutory provisions of law and therefore, according to my opinion, the tribunal has rightly and perfectly passed the legal and valid award and as such, no error has been committed by the tribunal. This Court cannot exercise the powers under Article 227 of the Constitution of India and no interference of this Court is warranted in the award in question. Therefore, there is no substance in the present petition and accordingly, present petition is dismissed.

Rule stands discharged with no order as to costs.

In view of the present order, no order requires in Civil Application No.2003 / 1999 and the same does not survive and stands disposed of accordingly.

Date : 18.1.2004 [H.K.Rathod, J.]

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